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# What Remains of the Alien Tort Statute after Kiobel

Matteo M. Winkler

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# What Remains of the Alien Tort Statute after Kiobel

## **Cover Page Footnote**

International Law; Commercial Law; Law

# What Remains of the Alien Tort Statute After *Kiobel*?

Matteo M. Winkler†

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## I. Introduction

On April 17, 2013, the Supreme Court of the United States decided *Kiobel v. Royal Dutch Petroleum Co.*<sup>1</sup> The Court held that the Alien Tort Statute (ATS),<sup>2</sup> which entitles aliens to sue before federal courts for torts committed in violation of international law, does not apply when “all the relevant conduct took place outside the United States.”<sup>3</sup> It maintained that its decision in *Morrison v. National Australia Bank*,<sup>4</sup> which held that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none,”<sup>5</sup> governed the interpretation of the ATS.<sup>6</sup> The Court concluded that, without indications that Congress

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† Contract Professor of International Law and European Union Law at Bocconi School of Law, Milan (Italy); LL.M. Yale Law School (2007); Ph.D. International Law & Economics, Bocconi University (2007). The Author wishes to thank Pietro Fazzini and Pablo Sandoval for their precious suggestions.

<sup>1</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

<sup>2</sup> Alien Tort Claims Act, 28 U.S.C. § 1350 (2011).

<sup>3</sup> *Kiobel*, 133 S. Ct. at 1669.

<sup>4</sup> *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010).

<sup>5</sup> *Id.* at 2878.

<sup>6</sup> The Court stated the presumption against extraterritoriality did apply to the ATS despite its jurisdictional nature as opposed to the substantive issue that controlled in *Morrison*. See *id.* at 2881; *Kiobel*, 133 S. Ct. at 1660-61. In fact, “the principles underlying the canon of interpretation similarly constrain courts considering causes of actions that may be brought under the ATS.” *Id.*, 133 S. Ct. at 1660-61.

clearly gave the ATS application outside the United States, the statute does not apply extraterritorially.<sup>7</sup>

This note explores the consequences of *Kiobel* on transnational human rights litigation in U.S. courts.<sup>8</sup> Human rights lawyers and advocates feared and continue to fear that *Kiobel* is the death knell for transnational human rights actions in U.S. federal courts.<sup>9</sup> Among them is the famous former U.N. Secretary General's Special Representative for Business and Human Rights, John G. Ruggie, who predicted that, should the Court agree with the defendants, "there would be little if anything left of the ATS."<sup>10</sup> The point is subtle.<sup>11</sup> The ATS is commonly considered to play a fundamental role in creating a cultural human rights framework for multinational enterprises.<sup>12</sup> If this is true, limiting its reach would significantly weaken, and ultimately vanquish, its capacity to favor the promotion of human rights at the global level.<sup>13</sup>

Alarmist concern notwithstanding, there is not much to fear, for at least two reasons. First, *Kiobel* did not sign a death sentence

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<sup>7</sup> "In the end, nothing in the text of the ATS evinces the requisite clear indication of extraterritoriality." *Kiobel*, 133 S. Ct. at 1666.

<sup>8</sup> Nowadays, the ATS plays a prominent role in international human rights litigation. See Julian Ku, *Response: Rethinking the Direction of the Alien Tort Statute*, 100 GEO. L.J. 2217, 2218 (2011-2012) (noting that "as ATS cases became more frequent[], legal scholars and advocates began to focus on the ATS as a crucial mechanism for developing . . . international human rights law."); Eric A. Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal*, 155 U. PA. L. REV. 1925, 1928 (2007) (noting that the ATS "is the most prominent and effective means for litigating international human rights claims."); Jaykumar Menon, *Alien Tort Statute*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 240-41 (Antonio Cassese, ed., 2009) (noting that the ATS is "a prominent vehicle for the litigation of international human rights claims in the domestic federal courts of the United States").

<sup>9</sup> See, e.g., Brief of the American Bar Association as *Amicus Curiae* in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 at 18 ("Limiting the ATS to exclude [extraterritorial] claims, in many cases, would deny the possibility of justice to all such persons.").

<sup>10</sup> JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 196 (2013).

<sup>11</sup> See *id.*

<sup>12</sup> See Charles W. Brower, *Calling All NGOs: A Discussion of the Continuing Vitality of the Alien Tort Statute as a Tool in the Fight for International Human Rights in the Wake of Sosa v. Alvarez-Machain*, 26 WHITTIER L. REV. 929, 949 (2004-05) (arguing that "[ATS] litigation has been, by far, the most effective means of accomplishing long-term progress towards protecting individuals from egregious human rights abuses").

<sup>13</sup> See *id.*

for the ATS because it only eliminated from future ATS litigation those ATS actions discussed in *Morrison*: so-called F-cubed ATS actions in which foreign defendants are sued for conduct that took place entirely within foreign territory.<sup>14</sup> All other actions remain within the reach of U.S. courts.<sup>15</sup>

Second, the Court's focus on the issue of the statute's extraterritoriality, instead of corporate liability, limited the ruling's scope.<sup>16</sup> Even after *Kiobel*, the issue of corporate liability under the ATS remains unsettled.<sup>17</sup> As it stands now, U.S.-based corporations can be lawfully sued before federal courts, while foreign companies can be subject to the ATS only under certain conditions.<sup>18</sup> In other words, even if it is hard to deny that *Kiobel* significantly restricted the reach of the ATS,<sup>19</sup> the restriction is nonetheless not as expansive as one may think at first glance.<sup>20</sup>

This logic will be explained in several parts. Part II discusses the question of ATS's extraterritoriality, which was decided by several courts prior to *Kiobel* and in other ATS proceedings.<sup>21</sup> Part III discusses *Morrison* in more depth,<sup>22</sup> while Part IV examines *Kiobel*.<sup>23</sup> The two judgments are bound to each other, as the Supreme Court used the former to decide the latter.<sup>24</sup> Part V presents a reading of *Kiobel* that keeps the door ajar for many human rights lawsuits based on the ATS, thus responding to the question raised previously.<sup>25</sup> Part VI offers some concluding thoughts.<sup>26</sup>

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<sup>14</sup> See *infra* notes 43-58 and accompanying text.

<sup>15</sup> See *infra* notes 119-146 and accompanying text.

<sup>16</sup> See *Kiobel*, 133 S. Ct. at 1669-70 (Alito, J., concurring).

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> See *infra* notes 119-146 and accompanying text.

<sup>21</sup> See *infra* notes 27-58 and accompanying text.

<sup>22</sup> See *infra* notes 59-92 and accompanying text.

<sup>23</sup> See *infra* notes 93-118 and accompanying text.

<sup>24</sup> See *Kiobel*, 133 S. Ct. at 1669.

<sup>25</sup> See *infra* notes 119-146 and accompanying text.

<sup>26</sup> See *infra* notes 147-150 and accompanying text.

## II. Extraterritoriality and the ATS

Pursuant to the ATS, aliens can sue before federal courts “for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>27</sup> This provision was enacted by the Continental Congress in 1789 in response to certain aggressions committed by individuals against foreign agents.<sup>28</sup> Because of its “archaic inscrutability and almost homeopathic brevity, [the ATS] creates conceptual headaches at every turn.”<sup>29</sup> In fact, some terms like “jurisdiction,”<sup>30</sup> “civil action,”<sup>31</sup> and “alien”<sup>32</sup> are self-explanatory; in contrast, the provision fails to establish whether

<sup>27</sup> 28 U.S.C. § 1350 (2011). The general literature on the Alien Tort Statute (ATS), sometimes also called “Alien Tort Claims Act” (ATCA), cannot be entirely reported here.

<sup>28</sup> On May 17 and 19, 1784, Chevalier Charles Julian de Longchamps first insulted and then assaulted the French Consul General to the United States, Francis Barbe Marbois. *Respublica v. De Longchamps*, 1 U.S. 111, 118 (1784). Three years later, a constable in New York entered the private house of the Dutch minister plenipotentiary to arrest a servant. Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 641-42 (2002). “These incidents highlight public awareness of the Confederation Congress’s general inability to redress law of nations violations in the states.” Anthony J. Bellia & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 467 (2011).

<sup>29</sup> Andrew J. Wilson, *Beyond Unocal: Conceptual Problems in Using International Norms to Hold Transnational Corporations Liable Under the Alien Tort Claims Act*, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 43 (Olivier De Schutter, ed., 2006).

<sup>30</sup> WILLIAM M. RICHMAN ET. AL., UNDERSTANDING CONFLICT OF LAWS 14 (2003) (“Judicial jurisdiction in the most inclusive sense refers to the power or ability of a court to hear a dispute and render a valid judgment—valid in the sense that it will be recognized by other courts.”).

<sup>31</sup> The existing differences between tort law and criminal law are well-established among scholars as well as in practice. See Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 719-21 (2007-08). See also David Friedman, *Beyond the Tort/Crime Distinction*, 76 B.U. L. REV. 103, 108-09 (1996). First, the State is in charge of prosecuting violations of criminal law, whereas in tort proceedings, the victim may choose whether to take any action. Simons, *supra* note 31, at 719. Second, while tort law requires a harm in every case, criminal law does not. *Id.* at 720. Third, criminal law’s sanctions involve the loss of life or liberty, while the victim of a tort may seek only a monetary remedy. *Id.* Fourth, proportionality is demanded in criminal law, while in tort law, the proportionality of redress is more tenuously connected to the harm whose remedy is sought. *Id.* at 720-21.

<sup>32</sup> The term “alien” includes both individuals and corporations. See *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 106 (1898) (holding that the term in the Judiciary Act has always been interpreted “to include corporations”).

the substantive regime of “tort” is determined by domestic or international law,<sup>33</sup> or where the violation of the “law of nations”<sup>34</sup> must be “committed” in order for federal courts to obtain jurisdiction.<sup>35</sup> In this last respect, one may characterize the ATS as “geoambiguous.”<sup>36</sup>

Given these elements, it is no surprise that federal courts found no apparent obstacle in expanding the ATS by applying it in lawsuits with no significant connection to the U.S. A typical example in this respect is the very first ATS case, *Filártiga v. Peña-Irala*.<sup>37</sup> In *Filártiga*, the plaintiffs were the Paraguayan family of a young boy who had been tortured and ultimately killed

<sup>33</sup> Compare *John Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) (holding that “the law of the United States and not the law of nations must provide the rule of decision in [an] ATS lawsuit”) with *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) (discussing whether the violations claimed by the plaintiffs constituted violations of international law) and *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 269 (2d Cir. 2007) (Katzmann, J., concurring) (“We have repeatedly emphasized that the scope of the [ATS]’s jurisdictional grant should be determined by reference to international law.”) and *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring).

<sup>34</sup> The law of nations, today called international law, is based in large part upon two sources: customs and treaties. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993. Custom constitutes “evidence of a general practice accepted as law.” *Id.* It “does mirror the characteristic of the decentralised international system, [as] it reflects the consensus approach to decision-making with the ability of the majority to create new law binding upon all, while the very participation of states encourages their compliance with customary rules.” MALCOLM N. SHAW, *INTERNATIONAL LAW* 74 (6th ed., 2008). Compared to custom, treaties are “a more direct and formal method of international law creation.” *Id.* at 902. On the mechanisms concerning the implementation of international law in the U.S. legal system, see Paul R. Dubinsky, *United States*, in *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS* 631 (Dinah Shelton, ed., 2011).

<sup>35</sup> As one secondary source reported before *Kiobel*, the ATS does not require “any connection between conduct, victim or perpetrator and the United States—indeed, the only textual requirements imposed by the ATS are that the plaintiff must not be a US citizen and that the cause of action is a tort under the laws on nations.” INTERNATIONAL BAR ASSOCIATION, *REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION* 112 (2008).

<sup>36</sup> Laws can be characterized as “geoambiguous” when they “proscribe or regulate conduct but . . . remain silent about whether they apply to acts that occur outside of the United States.” Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 114 (2010).

<sup>37</sup> *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

in Paraguay by the defendant, a Paraguayan police officer.<sup>38</sup> The court found it had jurisdiction under the ATS,<sup>39</sup> and *Filartiga* inaugurated a new wave of ATS jurisprudence.<sup>40</sup>

Most cases of this first wave involved foreigners suing other foreigners in the U.S. in relation to conduct that happened abroad.<sup>41</sup> For instance, in *Kadic v. Karadžić*,<sup>42</sup> the same court found the ATS was applicable to conduct performed by individuals irrespective of whether it implicated governmental action, so the ATS's jurisdiction extended to all individual acts committed in violation of international law.<sup>43</sup>

Even the first ATS case discussed before the Supreme Court was extraterritorial. In *Sosa v. Alvarez-Machain*,<sup>44</sup> the Court dealt with the kidnapping of a Mexican doctor in Mexico.<sup>45</sup> Although the Court took the chance to establish guidance for lower courts' interpretation of the statute,<sup>46</sup> it never questioned the ATS's applicability to the facts of the case.<sup>47</sup>

Accordingly, lower courts were perfectly comfortable in

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<sup>38</sup> *Id.* at 878.

<sup>39</sup> *Id.* at 889 (concluding that "federal jurisdiction may properly be exercised over the *Filartiga*'s claim").

<sup>40</sup> See Terry Collingsworth, *Boundaries in the Field of Human Rights: The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 188 (2002) (arguing that since *Filartiga*, "the [ATS] has been used with increasing frequency to reach direct perpetrators of human rights abuses").

<sup>41</sup> See *Kadic v. Karadžić*, 70 F.3d 232, 239 (2d Cir. 1995); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

<sup>42</sup> *Kadic*, 70 F.3d at 232.

<sup>43</sup> *Id.* at 239.

<sup>44</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>45</sup> *Id.* at 697.

<sup>46</sup> In *Sosa*, the Court ruled the jurisdictional prong of the ATS was limited. *Id.* at 712. First, the ATS did not confer a cause of action, but "was intended as jurisdictional in the sense of addressing the power of courts to entertain cases concerned with a certain subject." *Id.* at 714. Second, not all causes would ground actions under the ATS, but only those "rest[ing] on a norm of international character . . . defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 725. Third, lower courts were called to pay special attention to "the practical consequences of making that cause available to litigants in the federal courts." *Id.* at 732. In this respect, "the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today." *Id.* at 729.

<sup>47</sup> *Id.* at 763.



considering *Sosa* as the positive example—an implicit statement by the Court indeed—that the ATS could plainly apply to events that happened outside the U.S. For instance, in *Flomo v. Firestone*,<sup>48</sup> Judge Posner, speaking for the Court of Appeals of the Seventh Circuit, examined and vigorously rejected Firestone’s argument that the ATS could not apply to events that took place wholly in its Liberian plantations.<sup>49</sup> Posner maintained, in particular, that “[c]ourts have been applying the statute extraterritorially . . . since the beginning; no court to our knowledge has ever held that it doesn’t apply extraterritorially . . .”<sup>50</sup> Moreover, in *Doe VIII v. Exxon Mobil*,<sup>51</sup> the D.C. Circuit Court reached the same conclusion, based on “the Supreme Court’s failure to disapprove of [extraterritorial] lawsuits in *Sosa*.”<sup>52</sup> In truth, courts have not solely relied on *Sosa*, but also referred to the ATS’s text and history.<sup>53</sup> According to the Court of Appeals for the Ninth Circuit, for example, the existence of piracy among the possible torts actionable under the ATS, as well as the statute’s text and history, “are all indications of extraterritorial applicability.”<sup>54</sup>

Scholars have reflected on the extraterritoriality of the ATS as well. Some have noted, in this respect, that *Sosa* “did not limit the ATS to scenarios in which the United States might have an affirmative obligation to prevent the violation of international law or otherwise . . . worry about its own compliance with international law.”<sup>55</sup> Others, while criticizing the ATS from the standpoint of global welfare and economic analysis, have stated that the ATS’s extraterritorial application ultimately favors local

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<sup>48</sup> *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011).

<sup>49</sup> *Id.* at 1025.

<sup>50</sup> *Id.*

<sup>51</sup> *John Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011).

<sup>52</sup> *Id.* at 27 (“Given Congress’s ratification of ATS lawsuits involving foreign conduct and the Supreme Court’s failure to disapprove of such lawsuits in *Sosa*, we conclude that the extraterritoriality canon does not bar appellants from seeking relief based on Exxon’s alleged aiding and abetting of international law violations committed in Indonesia.”).

<sup>53</sup> See *Sarei v. Rio Tinto*, 671 F.3d 736, 746 (9th Cir. 2011), *vacated*, 133 S. Ct. 1995 (2013).

<sup>54</sup> *Id.*

<sup>55</sup> Ingrid Wuerth, *Remarks*, 106 AM. SOC’Y INT’L L. PROC. 490, 491 (2012).

competitors and harms U.S. companies operating abroad.<sup>56</sup> Even so, the ATS does not require the application of U.S. law, but rather application of the “law of nations.”<sup>57</sup> Therefore, the ATS’s jurisdictional prong is purely adjudicatory, and not prescriptive.<sup>58</sup>

In conclusion, despite criticisms raised of the extraterritorial application of the ATS in the past, its extraterritorial applicability appeared a well-settled principle, established in case law and accepted among scholars.

### III. *Morrison* and the Presumption Against Extraterritoriality

The *Kiobel* Court broke with this trend and, relying heavily on *Morrison v. Australia National Bank*, determined that the ATS did not apply extraterritorially.<sup>59</sup> *Morrison* involved a class of Australian investors alleging that a fraud had been orchestrated against them by the defendants, a group of Australian citizens.<sup>60</sup> The case can be characterized as an “F-cubed action”—in other words, “an action by [a] non-US foreigner suing on shares of a foreign company bought on a foreign exchange.”<sup>61</sup> The only

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<sup>56</sup> Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161, 2202 (2011-12) (“[W]hen the tort occurs abroad, it will often be the case that a corporation accused of malfeasance, and subject to suits in the United States, will have actual or potential competitors abroad that are not subject to suit here for comparable conduct . . . . [T]he result . . . may be the diversion of foreign business opportunities to less efficient competitors . . . .”). This is what actually happened with the Canadian company Talisman Energy: After the beginning of hostile litigation before American courts, it retired from Sudan and was quickly replaced by a Chinese company in local investments, despite eventually prevailing on a motion to dismiss before the Second Circuit. *See id.* at 2195.

<sup>57</sup> William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 HARV. INT’L L.J. ONLINE 35 (2010), [http://www.harvardilj.org/2010/05/online\\_51\\_dodge/](http://www.harvardilj.org/2010/05/online_51_dodge/).

<sup>58</sup> *See id.* at 37 (“Courts do not apply U.S. substantive law in ATS cases; they apply customary international law . . . . In international law terms, the kind of jurisdiction courts exercise in ATS cases is not jurisdiction to prescribe but jurisdiction to adjudicate. It is the same kind of jurisdiction that courts exert in conflict-of-laws cases when they apply law that is not made by their own sovereign to parties over whom they have personal jurisdiction.”).

<sup>59</sup> *Kiobel*, 133 S. Ct. at 1668.

<sup>60</sup> *Morrison*, 130 S. Ct. at 2876.

<sup>61</sup> Thomas A. Dubbs, *Morrison v. National Australia Bank: The US Supreme Court Limits Collective Redress for Securities Fraud*, in EXTRATERRITORIALITY AND COLLECTIVE REDRESS 335, 338 (Duncan Fairgrieve & Eva Lein eds., 2012). F-cubed

connection with the U.S. present in *Morrison* was that the leading defendant corporation had a wholly owned subsidiary in Florida, one HomeSide Lending, Inc.<sup>62</sup> Plaintiffs accused HomeSide and its executives of manipulating the company's valuation models to overstate the mortgage value of homes whose purchase it financed, harming the investors.<sup>63</sup> All the fraud allegedly took place in Florida.<sup>64</sup>

The applicable statute was Section 10(b) of the Securities and Exchange Act of 1934, together with SEC Rule 10b-5.<sup>65</sup> Both aim to prevent and punish those persons who

use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe.<sup>66</sup>

Writing for the Court, Justice Scalia established a presumption against extraterritoriality potentially applicable to any statute—the same that *Kiobel*, accordingly, applied to the ATS.<sup>67</sup> The presumption is that “legislation of Congress, unless a contrary intent appears, is meant to apply only within the jurisdiction of the United States,”<sup>68</sup> so that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”<sup>69</sup> In this respect, since the 1960s, U.S. courts have determined the jurisdictional reach of Section 10(b) using a conduct-effects test.<sup>70</sup> In brief,

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securities actions are “collective lawsuits, often attorney-driven rather than client-centered, in which foreign investors sue[] foreign defendants in the United States for misrepresentations connected to transactions occurring abroad.” Marco Ventoruzzo, *Like Moths to a Flame? International Securities Litigation after Morrison: Correcting the Supreme Court's “Transactional Test,”* 52 VA. J. INT'L L. 405, 407 (2011-12).

<sup>62</sup> *Morrison*, 130 S. Ct. at 2883.

<sup>63</sup> *Id.* at 2875-76.

<sup>64</sup> *Id.* at 2883-84.

<sup>65</sup> *Id.* at 2875.

<sup>66</sup> Securities and Exchange Act of 1934, 15 U.S.C. § 78j (2011).

<sup>67</sup> *Morrison*, 130 S. Ct. at 2882-83.

<sup>68</sup> *Id.* at 2877.

<sup>69</sup> *Id.* at 2878.

<sup>70</sup> *Id.* at 2889.

when the conduct or its effects have some connection with the United States, U.S. courts have jurisdiction.<sup>71</sup> As to the requisite intensity of such a connection with respect to conduct, different circuits adopted different standards.<sup>72</sup> In this regard, some courts required the connection to consist of “substantial acts,” while others command proper causation.<sup>73</sup> Moreover, in order to assert jurisdiction under Section 10(b), courts have required that the transaction have substantial adverse effects on the U.S. market.<sup>74</sup> In *Morrison*, the Supreme Court “demanded a clear break with this longstanding practice.”<sup>75</sup>

In particular, Scalia established the presumption against extraterritoriality by relying on a canon of statutory interpretation in order to eradicate the “unpredictable and inconsistent [results]”<sup>76</sup> of the traditional conduct-effects test.<sup>77</sup> Speaking for the Court, Scalia was concerned that a presumption to the contrary would deprive Congress of the “stable background” necessary to “legislate with predictable effects.”<sup>78</sup> He reasoned that the presumption against extraterritoriality was justified by “the advantage of a clear brightline rule rather than an ambiguous case-by-case assessment.”<sup>79</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> See Brett R. Marshall, *Morrison v. National Australia Bank Ltd.: A Clear Statement Rule or a Confusing Standard*, 37 J. CORP. L. 204, 209-211 (2011-12) (discussing certain courts’ slightly different approaches to the conduct-effects test).

<sup>73</sup> See *id.* (explaining that the Second Circuit demands that substantial fraudulent acts occur within the U.S. for a foreign plaintiff’s case to be heard, and that the D.C. Circuit requires all elements to result from conduct committed in the U.S.).

<sup>74</sup> See *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968) (finding that “the language and purpose of [the Securities and Exchange Act of 1934] show that it was not meant to exempt transactions that are conducted outside the jurisdiction of the United States”).

<sup>75</sup> Paul B. Stephan, *Introductory Note to U.S. Supreme Court: Morrison v. Australia Nat’l Bank Ltd.*, 49 INT’L LEGAL MATERIALS 1217 (2010).

<sup>76</sup> *Morrison*, 130 S. Ct. at 2880.

<sup>77</sup> *Id.* at 2880-81.

<sup>78</sup> *Id.* at 2881. Also, the majority reasoned that, with respect to the conduct-effects analysis, “[t]he results of judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court—demonstrate the wisdom of the presumption against extraterritoriality.” *Id.*

<sup>79</sup> Linda J. Silberman, *Morrison v. National Australia Bank: Implications for Global Securities Class Actions*, in EXTRATERRITORIALITY AND COLLECTIVE REDRESS 363, 367.

In addition, the presumption embodied a “longstanding principle of American law,”<sup>80</sup> which had been recognized in previous cases. In *EEOC v. Arabian American Oil Co.*,<sup>81</sup> for example, the Supreme Court rejected a claim that Title VII of the Civil Rights Act of 1964,<sup>82</sup> which outlaws discriminatory employment practices based on race, color, sex, and nationality, applied to employment contracts between U.S. citizens employed abroad by American employers.<sup>83</sup> The Court required the petitioner, a U.S. citizen born in Lebanon, to “demonstrat[e] the affirmative congressional intent required to extend the protection of Title VII beyond [U.S.] territorial borders.”<sup>84</sup> The Court observed:

Congress knows how to place the high seas within the jurisdictional reach of a statute . . . [and] Congress’ awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute.<sup>85</sup>

What the petitioner was required to do was to “present sufficient affirmative evidence”<sup>86</sup> in favor of Title VII’s extraterritorial reach, and he failed.<sup>87</sup> As Justice Marshall reasoned in his dissent, the presumption against extraterritoriality became “a barrier to any genuine inquiry into the sources that reveal Congress’ actual intentions.”<sup>88</sup>

Applied to *Kiobel*, *Morrison* presents two questions. First, whether sufficient evidence exists that Congress intended the ATS to reach human rights violations committed abroad.<sup>89</sup> This was the

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<sup>80</sup> *Kiobel*, 130 S. Ct. at 2877.

<sup>81</sup> *Equal Emp’t Opportunity Comm’n v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991).

<sup>82</sup> Civil Rights Act of 1964, 42 U.S.C. §§ 1981-2000h-6 (2011).

<sup>83</sup> *Arabian Am. Oil Co.*, 499 U.S. at 244.

<sup>84</sup> *Id.* at 249.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 259.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 278 (Marshall, J., dissenting).

<sup>89</sup> See *infra* notes 93-118 and accompanying text.

question answered—negatively—by the *Kiobel* Court, as will be explicated in the next part.<sup>90</sup> The second question is whether *Kiobel*'s holding really establishes a brightline rule for future transnational human rights litigation. In other words, what are the circumstances in which human rights advocates and lawyers can still exploit the ATS to vindicate the rights of victims of human rights abuses, after *Kiobel*?<sup>91</sup> This question is answered in the fifth part.<sup>92</sup>

#### IV. An Analysis of *Kiobel*

*Kiobel* was an action brought against certain companies of the Anglo-Dutch Shell group by inhabitants of Ogoniland, a region in the country where Shell was conducting oil drilling and extraction activities.<sup>93</sup> The plaintiffs claimed that Shell's subsidiaries, operating in Nigeria since 1958, had committed atrocities in complicity with the Nigerian government, in particular murder, torture, crimes against humanity, and property destruction.<sup>94</sup> The

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<sup>90</sup> See *infra* notes 93-118 and accompanying text.

<sup>91</sup> See *infra* notes 119-146 and accompanying text.

<sup>92</sup> See *infra* notes 119-146 and accompanying text.

<sup>93</sup> See *Kiobel*, 133 S. Ct. at 1662-63.

<sup>94</sup> The trial started in 1996 with a lawsuit against Royal Dutch Petroleum Co. and Shell Transport and Trading Co., which soon filed a motion to dismiss. *Wiwa v. Royal Dutch Petroleum Co.*, No. 96-8386, 1998 U.S. Dist. LEXIS 23064, at \*1 (S.D.N.Y. Sept. 28, 1998), *aff'd sub nom*, *Kiobel v. Royal Dutch Petroleum, Co.*, 133 S. Ct. 1659 (2013). The district court granted the motion and, accordingly, dismissed the proceeding on *forum non conveniens* grounds, maintaining that U.K. courts were a more appropriate forum to hear the case. *Id.* The Court of Appeals reversed and remanded for further proceedings, ruling that the U.S. was an appropriate forum for this kind of dispute. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *rev'd sub nom*, 133 S. Ct. 1659 (2013). The proceeding reached the discovery stage, but District Court Judge Kimba M. Wood invited the parties to clarify the impact of the Supreme Court decision in *Sosa* on the proceedings, so the final ruling was delayed. *Kiobel v. Royal Dutch Petroleum Co.*, 456 F.Supp.2d 457, 459 (S.D.N.Y. 2006), *aff'd in part, rev'd in part*, 133 S. Ct. 1659 (2013). A second action was brought against Brian Anderson, former managing director of the Nigerian subsidiary of the group. *Wiwa v. Royal Dutch Petroleum Co.*, No. 96-8386, 2002 U.S. Dist. LEXIS 3293, at \*1 (S.D.N.Y. Feb. 28, 2002), *rev'd sub nom*, 133 S. Ct. 1659 (2013). The defendant moved for a motion to dismiss, but the district court rejected it (except for two allegations, for which it asked the plaintiffs for supplemental briefing), maintaining that the case had been properly set forth before the court. *Id.* at \*1-3. A third action was initiated in 2004 against Shell Petroleum Development Company of Nigeria (SPDC), and again the defendant filed a motion to dismiss. *Kiobel v. Royal Dutch Petroleum, Co.*, No. 02-7618, renumbered No.

Court of Appeals for the Second Circuit dismissed the plaintiffs' claims, arguing that the plaintiffs had no standing under the ATS to pursue actions against corporate defendants because international law, which grounds all ATS causes of action under *Sosa*, does not contemplate corporate liability for torts.<sup>95</sup>

Initially, the Supreme Court granted certiorari on this question.<sup>96</sup> After the first argument, however, it decided to change the subject, shifting from corporate liability to extraterritoriality.<sup>97</sup> The reasons for this shift probably lay in the division among the Justices, between pro- and anti-ATS wings, which required the Court to find a less divisive and more acceptable question on which a majority or unanimity could agree.<sup>98</sup> Therefore, the ruling centered on whether the ATS applies to "violations of the law of nations occurring within the territory of a sovereign other than the United States."<sup>99</sup> The Court resorted to the presumption against extraterritoriality established in *Morrison*: for the ATS to have

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04-2665, 2008 U.S. Dist. LEXIS 16592, at \*1, \*5 (S.D.N.Y. Mar. 4, 2008), *aff'd*, 133 S. Ct. 1659 (2013). The court granted the motion and denied the plaintiffs' request for further jurisdictional discovery. *Id.* at \*1, \*5. The plaintiffs filed an appeal. *Wiwa v. Shell*, 335 Fed. Appx. 81, 83 (2009), *rev'd sub nom*, 133 S. Ct. 1659 (2013). On April 8, 2009, the parties entered into a \$15.5 million settlement with regard to all said proceedings. *Shell Settles Nigeria Deaths Case*, BBC NEWS (June 9, 2009, 9:43 AM), <http://news.bbc.co.uk/2/hi/africa/8090493.stm>.

<sup>95</sup> The ATS action was filed by Esther Kiobel and others in 2002. *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 457, 457-59 (S.D.N.Y. 2006), *aff'd in part, rev'd in part*, 133 S. Ct. 1659 (2013). The lead plaintiff was acting on behalf of Barinem Kiobel, an activist opposing the exploitation and pollution of the Niger Delta in the Ogoni region. *Id.* at 457-59. The claim was similar to the one brought in *Wiwa* and concerned the illegitimate detention, killing, and execution of activists by the Nigerian Government in complicity with Shell Group companies operating in the area. *See id.* at 464-67 (relying on *Wiwa* as persuasive authority).

<sup>96</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 472 (2011), *cert. granted*, 133 S. Ct. 1659 (2013).

<sup>97</sup> *Kiobel*, 133 S. Ct. at 1663 (ordering to clarify "[w]hether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."). For an analysis, see RUGGIE, *supra* note 10, at 194-96.

<sup>98</sup> Peter Henner, *When is a Corporation a Person? When it Wants to Be. Will Kiobel End Alien Tort Statute Litigation?*, 12 WYO. L. REV. 303, 304 (2012) ("It appear[ed] that the Court [wa]s badly fractured between [a] pro-ATS wing (Justices Breyer, Ginsberg, and Kagan) and the conservative anti-ATS wing (Justices Roberts, Alito, Scalia, and Thomas).").

<sup>99</sup> *Kiobel*, 133 S. Ct. at 1662.

extraterritorial reach, the Court reasoned, an authorization from Congress was required.<sup>100</sup> The Court then concluded such authorization did not exist.<sup>101</sup> To reach this conclusion, Chief Justice Roberts's opinion dealt with three aspects: the text, the history, and the purpose of the ATS.<sup>102</sup>

First, the Court stated, "nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach."<sup>103</sup> The reference the ATS makes to "any civil action," to international law, and to torts, seemed to the Court to be insufficient to establish that Congress sought its applicability to extend extraterritorially.<sup>104</sup>

Second, regarding the ATS's historical background, the Court recalled—mentioning William Blackstone's *Commentaries on the Laws of England*—that *Sosa* restricted the scope of the ATS to three specific breaches of international law existing in 1789: the violation of safe conducts, the breach of the rights of ambassadors, and piracy.<sup>105</sup> The first two violations appeared to motivate the first Continental Congress to enact the ATS; yet, the inclusion of piracy would support more clearly the statute's extraterritorial applicability.<sup>106</sup> Piracy, in fact, is the classical—and maybe the first—international crime punished by all states, even if committed outside their individual territories, especially on the high seas.<sup>107</sup> The Court, however, denied that "the existence of a cause of action against [pirates] is a sufficient basis for concluding that other causes of action under the ATS reach conduct that does

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<sup>100</sup> *Id.* at 1665.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> According to the Supreme Court, "[t]here was . . . a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships. Blackstone referred to it when he mentioned three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa*, 542 U.S. at 715.

<sup>106</sup> See Zachary Mills, *Does the World Need Knights Errant to Combat Enemies of All Mankind—Universal Jurisdiction, Connecting Links, and Civil Liability*, 66 WASH. & LEE L. REV. 1315, 1344-49 (2009).

<sup>107</sup> "Universal jurisdiction developed around the crime of piracy," and "the exercise of universal jurisdiction by national courts has become more common in recent years." *Id.* at 1322, 1328.



occur within the territory of another sovereign.”<sup>108</sup> Actually, “piracy involves conduct in places outside of any nation’s territorial jurisdiction, such as most notably [the] high seas,”<sup>109</sup> and, at the end of the eighteenth century, it was considered an exception, perhaps notably the only one, to the purely territorial jurisdiction of each state.<sup>110</sup>

In particular, the Court mentioned the opinion issued by Attorney General William Bradford in 1795 concerning the plunder of the coasts of Sierra Leone by U.S. private citizens in violation of the neutrality of the United States in the war between France and Great Britain.<sup>111</sup> Even though lower courts disagreed as to the real implications of Bradford’s opinion<sup>112</sup> and therefore a clarification could have been useful, the Court stopped short of adopting a potentially “definitive reading”<sup>113</sup> of that opinion, which it considered “hardly suffic[ient] to counter the weighty concerns underlying the presumption against extraterritoriality.”<sup>114</sup>

Finally, the Court focused on the ATS’s purpose. Some opinions of the time indicate that Congress intended the ATS to serve as a means for the United States to regain the trust of other nations at the international level, and not to create an unusual forum for enforcement of international legal norms.<sup>115</sup> In this respect, there is no indication that Congress sought the ATS to establish U.S. courts’ jurisdiction for extraterritorial torts.<sup>116</sup> Indeed, the contrary is true, as certain foreign powers, such as

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<sup>108</sup> *Kiobel*, 133 S. Ct. at 1667.

<sup>109</sup> Curtis A. Bradley, *Attorney General Bradford’s Opinion and the Alien Tort Statute*, 106 AM. J. INT’L L. 509, 511 (2012).

<sup>110</sup> See *id.* (pointing out that “[a] conclusion that the ATS historically could have been used to address piracy would not necessarily show . . . that the ATS also extended to conduct committed within the territory of a foreign sovereign . . .”).

<sup>111</sup> Breach of Neutrality, 1 Op. Att’y. Gen. 57 (1795).

<sup>112</sup> Bradley, *supra* note 109, at 515 (noting that “[s]ome judges have concluded that the Bradford opinion supports application of the ATS to conduct in foreign countries. Other judges have argued that the opinion supports only the exercise of ATS jurisdiction in the United States and on the high seas. Still other judges have contended that, to the extent that the opinion supports the extraterritorial application of the ATS, this is true only for conduct by U.S. citizens.”).

<sup>113</sup> *Kiobel*, 133 S. Ct. at 1668.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1666.

Canada, Germany, South Africa, and the United Kingdom, to mention only a few, are now protesting the exercise of jurisdiction by U.S. courts over foreign individuals and entities for acts committed in their territories.<sup>117</sup> The Court, therefore, concluded that the ATS is deeply connected with foreign policy, which is a matter properly reserved as the province of the legislature.<sup>118</sup>

## V. *Kiobel*'s Legacy

The question remains whether *Kiobel*, which imitates *Morrison* in several respects, actually provides a clear standard for determining which transnational claims are actionable under the ATS. As two concurring opinions plainly admitted, the decision in *Kiobel* "is careful to leave open a number of significant questions regarding the reach and interpretation of the [ATS]."<sup>119</sup> As a result, there is still significant room to bring actions under the ATS, especially given the fact that "the First Congress did not intend the provision to be 'stillborn.'"<sup>120</sup>

First, *Kiobel*'s factual background corresponded to a typical F-cubed action, like *Morrison*'s. As mentioned previously, the latter involved a lawsuit brought by Australian investors, mostly against Australian defendants, relating to investment transactions entered into in Australia.<sup>121</sup> *Morrison*, as Justice Ginsburg noted during the argument, "has 'Australia' written all over it."<sup>122</sup> The same was true of *Kiobel*.<sup>123</sup> The lawsuit concerned human rights violations committed by the Nigerian military against the Ogoni population in Nigeria.<sup>124</sup> The defendants' presence in the United States was limited to an office in New York City, owned by a subsidiary affiliated company.<sup>125</sup> The case had, therefore, no

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<sup>117</sup> *Id.* at 1669.

<sup>118</sup> *Id.* (noting that "far from avoiding diplomatic strife, providing such a cause of action could have generated it.").

<sup>119</sup> *Id.* (Kennedy, J. concurring). In addition, according to Justice Alito's concurrence, the opinion "obviously leaves much unanswered, and perhaps there is wisdom in the Court's preference for this narrow approach." *Id.* at 1669-70.

<sup>120</sup> *Id.* at 1663 (citing *Sosa*, 542 U.S. at 714).

<sup>121</sup> *Morrison*, 130 S. Ct. at 2876.

<sup>122</sup> Dubbs, *supra* note 61, at 335.

<sup>123</sup> *Kiobel*, 133 S. Ct. at 1662.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1677 (Breyer, J., concurring).

connection with the United States other than the plaintiffs residing in the country on a refugee status.<sup>126</sup> As a result of the *Kiobel* decision, the exclusion of an extraterritorial application of the ATS affects F-cubed actions only.<sup>127</sup>

Second, *Kiobel* does not impact pending or future F-squared actions, i.e., those where one of the three elements considered—the citizenship of the plaintiff, the citizenship of the defendant, or the situs of the occurrences which ground the claim—is substantially connected with U.S. soil, thus removing one of its “F,” or foreign, attributes. As a consequence, when the defendant is (1) a U.S. citizen, (2) a company incorporated in the United States, or (3) an alien who finds him or herself in the United States, or if the conduct underlying the action occurred within the United States, the decision in *Kiobel* does not limit the ATS’s applicability.<sup>128</sup> Actions like *Filártiga*—where the defendant was irregularly residing in the United States<sup>129</sup>—and those where the alleged transaction took place in the United States would, therefore, still be within the reach of the ATS.<sup>130</sup> It seems quite well established, in this regard, that the First Congress “meant to grant the district courts original jurisdiction over ‘all causes where an alien sues,’ not just those in which the defendant was a U.S. citizen.”<sup>131</sup> In particular, the ATS would still cover actions against U.S. citizens and entities incorporated in the United States for violations committed abroad, such as the one against Exxon Mobil Corp.<sup>132</sup> On the contrary, cases like *Sarei v. Rio Tinto*,<sup>133</sup> the

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<sup>126</sup> *Id.* at 1662–63.

<sup>127</sup> *Id.* (Breyer, J., concurring).

<sup>128</sup> *Id.*

<sup>129</sup> *Filártiga*, 630 F.2d at 878–80.

<sup>130</sup> *Kiobel*, 133 S. Ct at 1669 (Breyer, J., concurring).

<sup>131</sup> William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT’L L. 687, 701 (2001-02) (quoting the Judiciary Act, ch. 20 § 9, 1 Stat. 73, 77 (1789), full quote stating: “all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States”) (omitted text in italics).

<sup>132</sup> See, e.g., *Exxon*, 654 F.3d at 11. However, on July 26, 2013, the Court of Appeals for the D.C. Circuit vacated the judgment in that case and remanded the ATS claims to district court for further consideration in light of *Kiobel*. *Doe v. Exxon*, No. 09-7125, 2013 U.S. App. Westlaw 3970103, at \*1 (D.C. Cir. July 26, 2013).

<sup>133</sup> *Sarei v. Rio Tinto PLC*, 185 L. Ed. 2d 863 (2013), order vacating and remanding 671 F.3d 736, 744 (9th Cir. 2011), in light of *Kiobel*.

underlying conduct of which took place entirely in Papua New Guinea, should be evaluated carefully in light of *Kiobel*'s restrictive holding (and likely dismissed).<sup>134</sup>

Third, ATS actions may still concern corporate defendants. In this respect, the shift in certiorari from corporate liability to extraterritoriality permitted preservation of all lawsuits brought against corporations that are compatible with *Kiobel*.<sup>135</sup> In other words, the shift allowed the Court to save the pending and future actions against corporations, with much hope (and satisfaction, one could say) for plaintiffs' lawyers and human rights activists.<sup>136</sup> As a result, the claim that the post-*Kiobel* ATS is dead and buried is a clear overstatement.<sup>137</sup>

Additionally, according to the Court, the ATS still would be applicable when "the claims touch and concern the territory of the United States."<sup>138</sup> Nevertheless, these claims must have "sufficient force"<sup>139</sup> to rebut the presumption against extraterritoriality and, in addition, "it would reach too far to say that mere corporate presence suffices."<sup>140</sup> This limiting dicta referred to corporations with "[a] minimal and indirect American presence"<sup>141</sup> (such as an office), not to those engaged in more intense activity on U.S. soil.<sup>142</sup> As a matter of practice, courts now will be required to determine the intensity of corporate defendants' presence in the United States, an element that case law had thus far mostly

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<sup>134</sup> *See id.*

<sup>135</sup> *Kiobel*, 133 S. Ct. at 1663.

<sup>136</sup> *See id.* at 1663 (shifting focus of the analysis). *See also id.* at 1669 (Kennedy, J., concurring) (addressing "serious violations of international law principles protecting persons" which may require "elaboration and exploration.").

<sup>137</sup> *See, e.g.,* Roger Alford, *Kiobel Insta-Symposium: The Death of the ATS and the Rise of Transnational Tort Litigation*, OPINIOJURIS (April 17, 2013), <http://opiniojuris.org/2013/04/17/kiobel-instthe-death-of-the-ats-and-the-rise-of-transnational-tort-litigation/>.

<sup>138</sup> *Kiobel*, 133 S. Ct. at 1669 (Breyer, J., concurring).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> In fact, "it would be farfetched to believe, based solely upon the defendants' minimal and indirect American presence, that this legal action helps to vindicate a distinct American interest, such as in not providing a safe harbor for an 'enemy of all mankind.'" *Id.* at 1678 (Breyer, J., concurring).

<sup>142</sup> *Id.* at 1665–66, 1669.

disregarded.<sup>143</sup>

Finally, still potentially included within the reach of the ATS is the situation in which the defendant takes refuge in the United States. The fact that an individual has committed violations of international law abroad and sought asylum in the United States gives rise to “a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.”<sup>144</sup> Hence, the point made by *Kiobel* is that the United States should not “pretend . . . to be the *custos morum* of the whole world”<sup>145</sup> and it should not transform itself—as Justice Scalia pointed out in *Morrison*—into “the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign [territories].”<sup>146</sup> It would be no surprise if lower courts were called, in the near future, to respond to cases exactly like these.

## VI. Conclusion

*Kiobel* will ignite debate on its various aspects and implications. It is no wonder that it was initially characterized as “a virtual earthquake of an opinion.”<sup>147</sup> What this note has argued is that, despite its apparently devastating results, *Kiobel* still, albeit limitedly, has an impact on transnational human rights litigation in U.S. courts.<sup>148</sup> Lawyers and courts still have work to do in order to properly interpret the ATS.

As Justice Kennedy pointed out in his concurrence, “[o]ther cases may arise with allegations of serious violations of international law principles protecting persons, cases [not] covered . . . by the reasoning and holding of today’s case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.”<sup>149</sup> Certainly, not only is the ATS “a

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<sup>143</sup> See *id.* at 1669 (Breyer, J., concurring).

<sup>144</sup> *Kiobel*, 133 S. Ct. at 1671, 1674 (Breyer, J., concurring).

<sup>145</sup> *Id.* at 1668 (Breyer, J., concurring).

<sup>146</sup> *Morrison*, 130 S. Ct. at 2886.

<sup>147</sup> Joel Slawotsky, *The Conundrum of Corporate Liability Under the Alien Tort Statute*, 40 GA. J. INT’L & COMP. L. 175, 179 (2011) (referring to the appeal ruling).

<sup>148</sup> See *supra* notes 120-146 and accompanying text.

<sup>149</sup> *Kiobel*, 133 S. Ct. at 1669.

kind of legal Lohengrin[:] no one seems to know whence it came,"<sup>150</sup> but it is still difficult to say, 200 years after its enactment, where it is actually going.

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<sup>150</sup> Int'l Invest. Trust v. Vencap Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).